(2)

No. 91-919

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

FREDERICK GEORGE BRIGHT - Petitioner

vs.

HOUSTON NORTHWEST MEDICAL CENTER SURVIVOR, INC. - Respondent

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEY FOR RESPONDENT

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Respondent, Houston Northwest Medical Center Survivor, Inc., respectfully opposes Petitioner's Petition for Writ of Certiorari to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit, which opinion affirms a summary judgment of the United States District Court for the Southern District of Texas and in support of such opposition submits the following.

JURISDICTION

The United States Supreme Court lacks jurisdiction to review the decision of the Court of Appeals. The decision of the Court of Appeals does not decide an important question of federal law in a way that conflicts with applicable decisions of this Court.

QUESTION PRESENTED FOR REVIEW

The question presented is whether the district court and the United States Court of Appeals erred in holding Plaintiff presented no evidence sufficient upon which a jury could reasonably find for the Plaintiff that his "on-call" time

spent away from his employer's place of business at locations of his own choosing and engaged in personal activities constitutes work time.

STATEMENT OF THE CASE

This is a former employee's suit for overtime compensation under section 7(a)(1) of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 207(a)(1).

Plaintiff Frederick George Bright worked for Northwest as a biomedical equipment repair technician from April, 1981 until January, 1983 when he was fired. He worked a forty-hour week and overtime was compensated at time and a half. During the first year of employment, Bright's supervisor wore a "beeper" and was "on call" to come to the hospital and make emergency repairs on biomedical equipment. He was not paid for "on-call" time but was paid when he was called in to work. When the

supervisor resigned in February, 1982, Bright succeeded him as the senior technician and in wearing the beeper and being on call through all his off-duty time. Bright always knew the job did not pay on-call time. If Bright were called to the hospital, he was compensated for each such call.

After his regular work hours, Bright did not remain at the hospital and was free to go wherever and do whatever he wanted, as long as he could be reached by the beeper, arrive in approximately twenty to thirty minutes and not be intoxicated to the degree he could not work on medical equipment.

During on-call time, Bright's activities included "normal shopping" including supermarket and mall shopping, eating at restaurants and going to movies.

ARGUMENT AND AUTHORITIES

Both *Skidmore v. Swift & Co.*, 323 U.S. 134, 89 L.Ed. 124, 65 S.Ct. 161 (1944) and *Armour & Co. v. Wantock*, 323 U.S. 126, 89 L.Ed. 118, 65 S.Ct. 165 (1944) held that no principle of law precludes waiting time from also being working time. *Skidmore*, 65 S.Ct. at 164 and *Armour*, 65 S.Ct. at 165. In both cases, unlike the present case, the employees were firemen who remained in or near their employer's place of business rather than pursuing personal activities in their homes and neighborhoods. The Court's holdings apply to those more restricted employees. For example, the Court states they "were not at liberty to go away." "Their duty was to stand and wait." *Armour*, 65 S.Ct. at 165. But unlike those cases, Bright was free to be in his home or anywhere else so long as he was approximately twenty minutes away.

While *Armour* and *Skidmore* stand for the proposition that in a proper setting, on-call time may be working time for purposes of overtime pay, they state that on-call time spend predominantly for the employee's benefit, as here, is not compensable.

In *Skidmore*, the Court looked to administrative interpretations for guidance and stated: "good administration of the Act and good judicial administration alike require that the standards of public enforcement and those for determining private rights shall be at variance only where justified by very good reasons. They determine the policy which will guide applications for enforcement." *Skidmore*, 65 S.Ct. at 163.

The interpretations referred to specifically address the on-call situation illustrated in the present case where Bright could be at home or other place of his choosing and the contrasting *Skidmore* and *Armour* situations where the

employees had to remain at or about the employer's place of business. *See* 29 CFR § 785.17:

> An employee who is required to remain on call on the employer's premises or so close thereto that he cannot use the time effectively for his own purposes is working while "on call." An employee who is not required to remain on the employer's premises but is merely required to leave word at his home or with company officials where he may be reached is not working while on call.

Bright, carrying a beeper, had more freedom than a person who had to stay near a telephone.

In both *Skidmore* and *Armour*, part of the employment time was spent in periods of idleness on the employer's premises waiting on call or on standby such that while they were there, the employees were amenable to the employer's discipline and not free to leave except for their evening meal. There is a profound difference between sitting in a company fire hall and being in one's own home or in a restaurant of one's choosing.

In summary, the level of restrictions on the employee's use of his time in the instant case simply does not rise to the level of those more stringent restrictions discussed in *Skidmore* and *Armour* when the Court discusses whether waiting time can be working time. There is no evidence in the instant case that the time was spend predominantly for the benefit of the employer. In fact, all the evidence is just the opposite, that is, that Bright spent the time in the conduct of his own personal affairs and in the ordinary normal routine of living.

The courts below correctly applied the standards of *Anderson* and impliedly asked whether a fair-minded jury could return a verdict for the Plaintiff on the evidence presented. Since the mere existence of a scintilla of evidence in support of the Plaintiff's position is insufficient, there must be evidence on which the jury could reasonably find for the Plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

242, 91 L.Ed.2d 202, 106 S.Ct. 2505. In this case none exists.

CONCLUSION

Houston Northwest Medical Center Survivor, Inc. prays this Court deny Petitioner's Application for Writ of Certiorari.

Respectfully submitted,

GAIL MAGERS
Attorney for Respondent

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PROOF OF SERVICE

I, Gail Magers, do swear and declare that on this date, December 13, 1991, pursuant to Supreme Court Rule 29.3, I have served the foregoing Reply Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope

containing three copies of the document in the United States mail properly addressed to each of them and with first-class postage pre-paid; the names and addresses of those served are as follows:

Maurice Bresenhan, Jr.
1100 Milam Bldg., Suite 2150
Houston, Texas 77002

Gail Magers
GAIL MAGERS

SUBSCRIBED AND SWORN TO BEFORE ME on this the 13th day of December, 1991 by Gail Magers.

KIM SCHROEDER
Notary Public, State of Texas
My Commission Expires 2/27/95

Kim Schroeder
Notary Public in and for
the State of Texas

Printed Name: Kim Schroeder

My Commission Expires: 2/27/95